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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936. No. 753.

AETNA INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

October Term, 1936. No. 754.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

October Term, 1936. No. 755.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, LIMITED,
Petitioner,

v.

JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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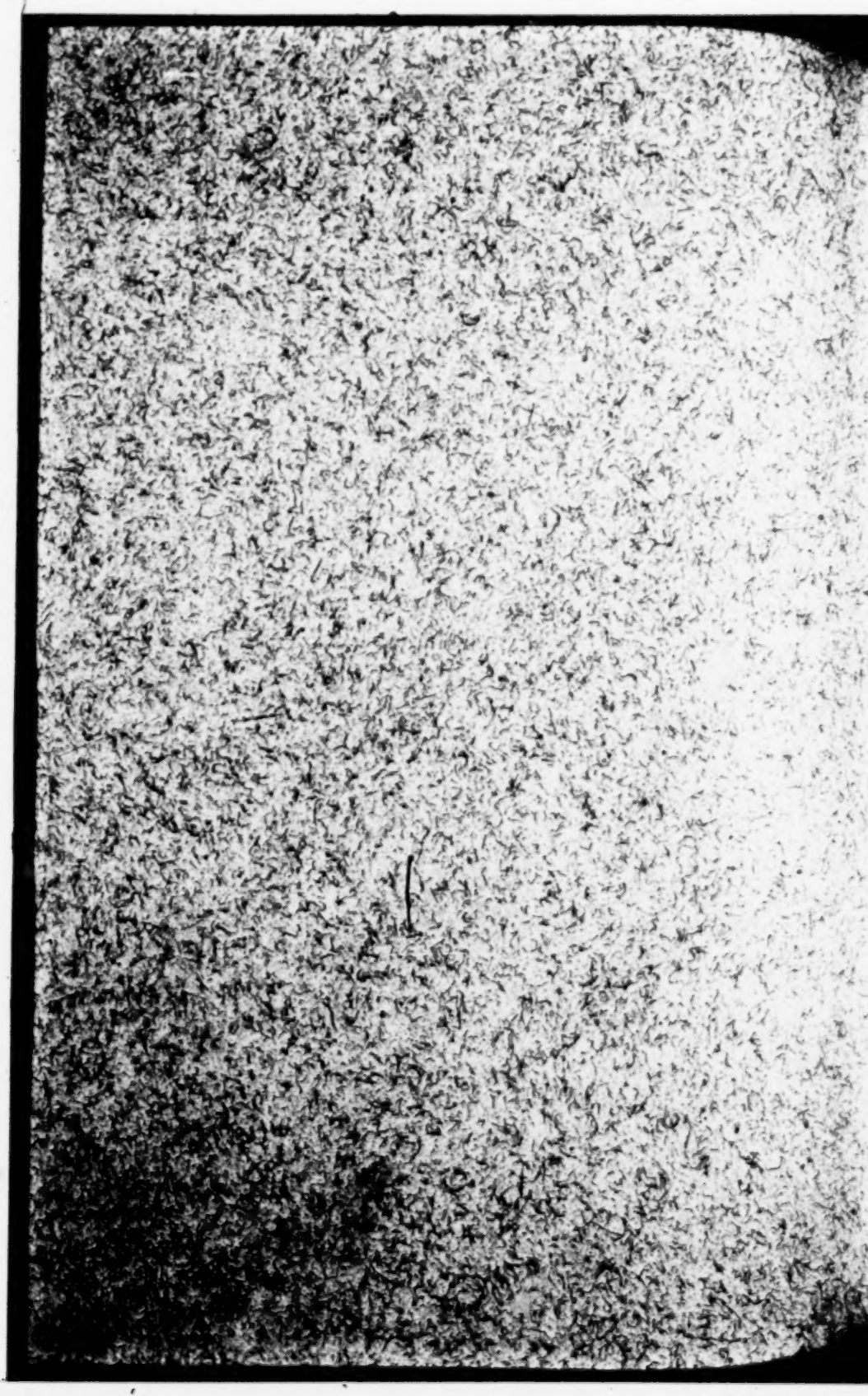

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IN THE

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JOHN M. KENNEDY, 3rd, to the Use of ANNA L. BOGASH,
Respondent.

BRIEF FOR PETITIONERS ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

I. OPINIONS BELOW.

The opinion of the District Court sur motion for new trial filed February 11, 1935, is printed in the Record at pages 133-135 and is not reported.

The original opinion of the Circuit Court of Appeals, filed January 16, 1936, is printed in the Record at page 148, and is reported in 87 Federal (2nd) 683.

The opinion of the Circuit Court of Appeals sur petition for rehearing, filed January 29, 1937, is printed in the Record at page 157, and is reported in 87 Federal (2nd) 684.

II. JURISDICTION.

The original decision of the Circuit Court of Appeals for the Third Circuit was rendered January 16, 1936. Petitions for rehearing were promptly presented on January 29, 1936, in accordance with Rule 27 of the Circuit Court of Appeals and the decision denying the petitions for rehearing was rendered on January 29, 1937.

The jurisdiction of this Court is invoked under

Sec. 240 (a) of the JUDICIAL CODE, as amended.

III. STATEMENT OF THE CASE.

These cases are identical and were tried together below. They arise out of a fire in an old brewery property owned by the Glenwood Industrial Distilling Company. Respondent, Kennedy (legal plaintiff below) held a first mortgage on the property. The Corn Exchange National Bank and Trust Company held a second mortgage and had taken out fire insurance policies on the property with petitioners (defendants below). The policies provided (Rec. pp. 40, 53, 64):

> "'It is understood that the buildings insured hereunder are now under foreclosure proceedings by the Corn Exchange National Bank & Trust Co. The premium being paid by the Corn Exchange National Bank & Trust Co., it is agreed that in event of loss, same will be adjusted with the Corn Exchange National Bank & Trust Co. and paid to them and John M. Kennedy, 3rd, Mortgagee, as interest may appear.''

They also provided that the insured might cancel at any time (Rec., pp. 45, 57), and that the insurance companies might cancel on ten days' notice (Rec. pp. 40, 53, 63).

The Corn Exchange National Bank decided to abandon its interest in the property as worthless. Its representative, Winnet, advised Kennedy of the bank's intention to cancel the policies and suggested he take them over. Kennedy at that time clearly indicated his consent to cancellation. His version of the transaction is as follows (Rec., p. 82):

> "A. As I recall the telephone conversation, Mr. Winnet said that he was cancelling, unless I chose to buy or take over the policies, to pay the unexpired premium. As I understood him, he was cancelling. I told him that I didn't intend to pay any unexpired premium or anything else, that I intended to put no further money into that building."

Winnet testified similarly as to the transaction (Rec., p. 109). Subsequently Winnet advised Kennedy by mail that the policies would be cancelled and he raised no objection (Rec., p. 110).

The bank thereafter surrendered the policies for cancellation and the unearned premiums for the unexpired term were paid to it February 27, 1932 (Rec., p. 116). The bank had paid the premiums on the policies at the time they were written (Rec., p. 96). Sometime thereafter, to wit, March 25, 1932 (Rec., p. 5) the brewery burned. After the fire Bogash, the use plaintiff, bought respondent's interest and commenced the present actions against your petitioners on the insurance policies.

The cases proceeded to trial together. At the trial both sides presented elaborate points for charge including, among others, requests for directed verdicts (Plaintiff's points, Rec., pp. 127-129; Defendants' points, Rec., pp. 129-131). The court refused the motions for directed verdicts

and, without reserving any questions of law, submitted the cases to the jury. The jury found in favor of petitioners (Rec., p. 132). Respondent filed a motion for a new trial in each of the cases. There was no motion filed by respondent for judgment in his favor. The motions for new trial were dismissed (See opinion of trial judge, Rec., pp. 133-135) and judgments were entered on the verdicts. The respondent appealed to the Circuit Court of Appeals. On January 16, 1936, the Circuit Court of Appeals reversed and remanded the cases for new trial on the ground that the District Court failed to emphasize sufficiently to the jury the clauses in the insurance policies with respect to notice of cancellation. It directed the cases should be sent back for retrial so that the jury might pass on whether respondent had both consented to cancellation and waived his alleged right to notice of cancellation (Rec., p. 150).

Your petitioners, convinced that a person who had consented to cancellation was not entitled to formal notice of his own act and that the notice clauses were applicable only where the policies were cancelled at the instance of the insurance companies, and convinced that the question of consent to cancellation had been adequately presented to the jury, thereupon presented petitions for rehearing, in accordance with Rule 27 of the Circuit Court of Appeals, permitting one rehearing within sixty (60) days of final judgment (Rec., pp. 152-157).

One year later and long after the term had expired, the Circuit Court of Appeals denied the petitions for rehearing. It nevertheless changed its prior opinion completely and held there was not sufficient evidence to go to the jury on the question of consent to cancellation. It also held that the parties had waived their right to trial by jury by submitting requests for directed verdicts, although at the same time they submitted numerous other points for charge. It thereupon, purportedly on the authority of:

BALTIMORE & CAROLINA LINE v. REDMAN,
295 U. S. 654,

proceeded to direct the entry of judgments for respondent. (Rec. pp. 157-162.)

Wherefore your petitioners are now before this court.

IV. SPECIFICATION OF ERRORS RELIED UPON.

The Circuit Court of Appeals erred:

1. In directing the entry of judgments for respondent and thereby denying your petitioners right to trial by jury.

2. In holding that, although the cases had been submitted to the jury below without the reservation of any points of law, it had the power to reverse the judgments in favor of your petitioners and direct the entry of judgments in favor of respondent.

3. In holding that the parties waived their right to trial by jury by submitting to the trial court requests for directed verdicts, although at the same time they also submitted numerous other points for charge.

4. In holding that there was not sufficient evidence on the question of consent to cancellation of the insurance policies to go to the jury.

5. In holding that regardless of consent to cancellation, respondent was thereafter entitled to formal notice of his own act of cancellation and that the trial court did not fairly present this matter to the jury.

6. In holding that the clause in the policies requiring notice of cancellation was applicable in this case where the companies did not seek to cancel the policies of their own initiative.

V. ARGUMENT.

Summary.

Point 1. Petitioners were denied their right to trial by jury.

Point 2. Petitioners did not waive their right to trial by jury.

Point 3. (A) The direction of judgments for respondent was not in conformity with the State practice.
(B) There was sufficient evidence to go to the jury on the question of consent to cancellation.

Point 4. Contracts of insurance may be cancelled by mutual consent.

Point 1. PETITIONERS WERE DENIED THEIR RIGHT TO TRIAL BY JURY.

The present cases were typical jury ones. Petitioners contended that respondent had consented to cancel the policies involved in suit prior to loss. The respondent denied this. The issue presented was a pure question of fact.

This was recognized by the trial judge who submitted the cases to the jury without qualification and without the reservation of any points of law. The jury rendered verdicts in favor of petitioners and judgments were duly entered thereon.

Respondent sought new trials in the District Court and, having been denied the same, appealed to the Circuit Court of Appeals. By its first opinion and decree the Circuit Court of Appeals granted new trials. Petitioners then applied for rehearings. The Circuit Court of Appeals, in denying the petitions for rehearing, rendered the decree of

which petitioners complain. They decided that there was not sufficient evidence to go to the jury on the question of consent to cancellation. They thereupon ordered that the judgments of the District Court entered on the verdicts, should be reversed and further directed the District Court to enter judgments for the respondent. We earnestly submit that the Circuit Court of Appeals thereby deprived petitioners of their right to trial by jury guaranteed by the Seventh Amendment.

The *Seventh Amendment of the Constitution* is as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The wording of the Amendment is significant. It first recites that in all suits the right to trial by jury shall be preserved. In order that there may be no doubt on the question, it further recites that no facts tried by a jury shall be otherwise re-examined than according to the rules of the common law. The Amendment as thus drawn is broad and emphatic. It was designed and intended to make the jury the sole trier of facts under all circumstances.

The rights guaranteed by this Amendment were carefully preserved by a number of decisions of this Court in the course of the nineteenth century. It is not necessary to review all of them. They are fully considered and commented upon in:

> SLOCUM v. NEW YORK LIFE INSURANCE COMPANY, 228 U. S. 364.

This case may well serve as a starting point for the present discussion. It is directly in point and specifically

condemns the decree rendered by the Circuit Court of Appeals in the present cases. Moreover, the Slocum Case was a very carefully considered decision. It contains an exhaustive review and examination of the common law and all the prior cases under the Seventh Amendment. In that case, the question presented was whether a life insurance policy had expired by reason of non-payment of premiums. The case was submitted to the jury who found a verdict in favor of the plaintiff. At the trial a motion for directed verdict was made by defendant and subsequently it moved for judgment non obstante veredicto upon the whole record. These motions were made conformably to a Pennsylvania statute which provided as follows:

Act of April 22, 1905, P. L. 286.

> "That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

The trial court denied the motion for judgment n. o. v., and the defendant appealed. The Circuit Court of Appeals,

in reliance upon the Pennsylvania statute, and because the evidence was not sufficient to sustain the jury, undertook to reverse the verdict and judgment of the court below and to enter judgment for defendant.

This court in a majority opinion delivered by Mr. Justice Van Devanter, held that the Circuit Court of Appeals, in rendering such decree, had violated the Seventh Amendment. After reviewing prior decisions the court said, *page 379*:

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested by the rules of the common law; second, that, while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess and cut off the plaintiff's right to have the facts settled by the verdict of a jury.
>
> "While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, this does not militate

against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. And this procedure was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues."

The Court then proceeded to discuss the instances at common law where the verdict of a jury could be disregarded and a case disposed of on appeal without new trial. It established that such instances were exceptional and existed only when, upon an examination of the pleadings (and not the evidence adduced at trial) it was clear that no factual issue was involved.

The present cases do not fall within any of the common law exceptions noted. The pleadings in the present cases presented a clear factual issue on the question of consent to cancellation. Therefore under the general rule announced in the Slocum Case, the Circuit Court of Appeals in the present cases was without power to overthrow the verdicts of the jury, on the ground that the evidence was not sufficient to justify their finding, and render judgments in favor of respondent. It was obliged to reverse the cases and remand them for new trial.

It should be particularly noted that in the Slocum Case this Court recognized that the Seventh Amendment was designed to preserve matters of real substance and not merely matters of form. In the majority opinion it was pointed out, on page *399*, that the right to a new trial was a valuable one because it afforded the losing party on appeal an opportunity to present further evidence if he could do so.

The Slocum Case has never been seriously questioned. It was followed in:

PEDERSON v. DELAWARE, LACKAWANNA & WESTERN RY. CO., 229 U. S. 146,
YOUNG v. CENTRAL RAILROAD OF N. J., 232 U. S. 602.

The next important case in this line of decisions is:

BALTIMORE & CAROLINA LINE v. REDMAN, 295 U. S. 654.

In this case plaintiff sued for personal injuries allegedly sustained through defendant's negligence. The case was submitted to the jury which rendered a verdict in favor of the plaintiff. Before the actual submission of the case the defendant had moved to dismiss the complaint because the evidence was insufficient to justify the submission of the case to the jury. The defendant also moved for a directed verdict in its favor. The court reserved its decision on both these motions and submitted the case to the jury subject to its opinion on the reserved points. After the jury's finding, the court denied defendant's motions and entered judgment on the verdict. The defendant appealed to the Circuit Court of Appeals which reversed the judgment and directed a new trial. The defendant then requested this Court to order the Circuit Court of Appeals to dismiss the case on the merits without a new trial.

This Court, in an opinion by Mr. Justice Van Devanter, granted defendant's request. It was careful, however, to distinguish, and not to overrule, the Slocum Case. In the decision it was pointed out that the case had been submitted to the jury with qualifications. The Court noted that this practice was recognized at common law and under a statute of the state in which the case was tried. The court justified its dismissal of the case on the merits solely because these points were reserved when the case was submitted to the jury.

The Baltimore & Carolina Line Case does not therefore justify the action of the Circuit Court of Appeals in the

present cases, and is clearly distinguishable. The present cases were submitted to the jury without qualification. There was no reservation of any questions of law with respect to the sufficiency of the evidence or otherwise.

The cases decided by the Circuit Courts of Appeals since the Baltimore & Carolina Line Case have recognized the limited scope of the decision. In:

THOMSON v. DOWNEY, 78 Fed. (2d) 487 (C. C. A. 7),

the Circuit Court of Appeals for the Seventh Circuit held that it could not reverse a verdict and judgment for plaintiff and render judgment for defendant where the case had been submitted to the jury without qualification. The inapplicability of the Baltimore & Carolina Line Case was noted as follows, at *page 491*:

> "In Baltimore & Carolina Line v. Redman, 55 S. Ct. 890, 79 L. Ed.—, decided by the Supreme Court on June 3, 1935, the Court held that, where the trial court had reserved its rulings until after the verdict on motions to dismiss for lack of evidence, and for peremptory instruction, and after the verdict had held the evidence sufficient and the motions ill-grounded, and accordingly entered a judgment for plaintiff on the verdict, then the Circuit Court of Appeals was warranted upon reversal of judgment for the plaintiff in directing the trial court to dismiss the declaration. In this case, however, the trial court did not reserve its rulings on motions to dismiss and for a directed verdict, but promptly overruled them before instructing the jury. The Redman Case, therefore, is not authority for us to direct a judgment of dismissal."

In harmony with this case see:

HEFFNER v. PENNSYLVANIA RAILROAD COMPANY, 81 Fed. (2d) 28 (C. C. A. 2).

Here the Circuit Court of Appeals for the Second Circuit said, *page 31*:

> "The defendant asks us to direct dismissal for lack of jurisdiction rather than to remand for a new trial. But the authority relied upon in support of this request, Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, does not justify it. In that case decision of the motion was reserved until after verdict; here it was not; and Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, controls."

WOLFE v. PENNSYLVANIA RAILROAD COMPANY, 82 Fed. (2d) 164 (C. C. A. 2).

Here the Circuit Court of Appeals for the Second Circuit said, *page 166*:

> "It is argued that we should direct the complaint to be dismissed under the rule laid down by the Supreme Court in Baltimore & Carolina Line, Inc., v. Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, but a new trial may only be avoided and final judgment rendered 'non obstante veredicto' where a motion to direct a verdict has been reserved and the verdict is taken subject to the reservation. In other situations the rule in Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, is still the law in the federal courts."

These cases are in direct conflict with the decision of the Circuit Court of Appeals in the present cases. They substantially represent petitioners' position on the present appeal and their interpretation of this Court's decision in the Slocum and Baltimore & Carolina Line Cases. In reliance upon them, petitioners very earnestly submit that the Circuit Court of Appeals' direction to enter judgments in favor of respondent was an unwarranted usurpation of

power and constituted a denial of petitioners' right to trial by jury.

Point 2. PETITIONERS DID NOT WAIVE THEIR RIGHT TO TRIAL BY JURY.

In the course of its second opinion, the Circuit Court of Appeals sought to evade the jury trial issue by suggesting that your petitioners had waived their right to trial by jury. It suggests that, because both sides submitted requests for directed verdicts, they impliedly consented to take the cases from the jury. It relies in this connection upon:

WILLIAMS v. VREELAND, 250 U. S. 295.

The rule established in that case was succinctly stated by Mr. Justice McReynolds, on *page 298*, as follows:

> "The established rule is, 'Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom.' "

This doctrine has no application to the present cases. In the present cases the motions for directed verdicts presented by the parties were embodied in the usual points for charge. Respondent submitted fifteen points for charge on various aspects of the cases and of these points 13, 14 and 15 were motions for directed verdicts (Rec., p. 129). The petitioners submitted twelve points for charge and the last of these was a motion for directed verdict (Rec., p. 131). In practically every jury case we have attended similar points have been presented, and it has never been imagined that their submission constituted a waiver of the right to trial by jury nor do we believe this Court ever suggested such a thing.

As just noted, this Court pointed out that a jury trial was waived only if both sides submitted requests for directed verdict and did nothing more. Undoubtedly this

Court had in mind that, if the parties accompanied their requests for directed verdict by other points for charge, there would be no waiver of a jury trial. Where both sides merely submit motions for directed verdict, the trial court would naturally be justified in assuming that the parties recognized there was no question of fact in dispute and that it was, therefore, authorized to dispose of the case itself. Where a number of points for charge are submitted by both sides, including requests for directed verdicts, no such assumption is warranted. The existence of these other points for charge indicates that both parties desire to go to the jury unless one of the motions for directed verdict is granted.

This limitation of the doctrine of William v. Vreeland, supra, has been pointed out in several cases.

BANK OF UNION v. FIDELITY & CASUALTY CO. OF N. Y., 62 Fed. (2d) 1040 (C. C. A. 8).

Here the Circuit Court of Appeals for the Eighth Circuit said, *page 1041*:

> "Ordinarily, where both parties move for a directed verdict without reservations, it amounts to a waiver of a jury trial, and a submission to the court of questions of fact as well as of law. Beuttell vs. Magone, 157 U. S. 154, 15 S. Ct. 566, 39 L. Ed. 654; Williams v. Vreeland, 250 U. S. 295, 39 S. Ct. 438, 63 L. Ed. 989, 3 A. L. R. 1038. But, where a party makes such motion, and at the same time requests instructions to the jury which show he does not intend to waive his right to jury trial if his motion is overruled, he cannot be held to have waived a trial by jury of the fact questions."

W. A. HOVER & CO. v. DENVER & RIO GRANDE RAILROAD CO., 17 Fed. (2d) 881 (C. C. A. 8).

Here the Circuit Court of Appeals for the Eighth Circuit said, *page 883*:

> "No waiver of the right to have a case submitted to a jury is presumed from a request for a directed verdict on the part of both parties, where there is coupled therewith a request for other instructions, or for the submission of disputed questions of fact to the jury. Minahan v. Grand Trunk Western Railway Co. (C. C. A.) 138 F. 37; Sigua Iron Co. v. Greene (C. C. A.) 88 F. 207."

See also:

EMPIRE STATE CATTLE CO. v. ATCHISON RAILWAY CO., 210 U. S. 1,

SAMPLINER v. MOTION PICTURE PATENTS COMPANY, 254 U. S. 233.

UNDERWRITERS' FINANCE CORP. v. UNION INDEMNITY CO., 61 Fed. (2d) 865 (C. C. A. 7).

In view of these authorities, and the well established trial practice, we submit there is no doubt that petitioners did not waive their right to jury trial.

The foregoing discussion has established, we believe, that the order of the Circuit Court of Appeals directing judgments for respondent constituted a denial of petitioners' rights under the Seventh Amendment. There are two further reasons why the direction for judgments was error in these cases. The first is that the order of the Circuit Court of Appeals was not in conformity with the state practice. The second is that in the present cases there was clearly sufficient evidence to go to the jury on the question of consent to cancellation.

Point 3 (a) THE DIRECTION OF JUDGMENTS WAS NOT IN CONFORMITY WITH STATE PRACTICE.

In the two leading cases which have previously been discussed at length, the Slocum Case and the Baltimore & Carolina Line Case, the importance of state practice was emphasized. In the Pennsylvania state courts, which are not bound by the Seventh Amendment, there is a special act which permits the rendition of a judgment contrary to verdict where the evidence does not justify the submission of a case to the jury. This statute is the same one which was considered previously in the Slocum Case. It has not been materially changed since. The present statute is as follows:

> ACT OF APRIL 22, 1905, P. L. 286, as amended April 9, 1925, P. L. 221 (12 Purdon's Penna. Statutes Annotated, Sec. 681).
>
> "Whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may within the time prescribed for moving for a new trial, or within such other or future time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."

This statute only empowers an appellate court to enter judgment contrary to the verdict when requests for binding instructions have been submitted at the trial, and when, after trial, a motion for judgment n. o. v. has been made upon the whole record. It has been repeatedly recognized by the Pennsylvania Supreme Court that unless both these motions are made it is without power to grant a judgment contrary to the verdict. In the absence of such motions the Pennsylvania Supreme Court must remand the case for new trial. One of the more recent cases in point is:

> COX, et al. v. ROEHLER (et ux, Appellant), 316 Pa. 417.

In this case the Supreme Court of Pennsylvania said, *page 419*:

> "In this state of the evidence, appellant is unquestionably entitled to final judgment. However, since no motion for binding instructions or for judgment n. o. v. was made, we are not at liberty to enter judgment for her: Sulzner v. Cappeau-Lemley & Miller Co., 234 Pa. 162; West v. Ins. Co., 277 Pa. 102."

In the present cases after verdict and judgment for petitioners, respondent made no motion for judgments n. o. v. It follows that even under the Pennsylvania practice the Circuit Court of Appeals' decree was unjustified.

Even if we were to assume that these cases were controlled by the Baltimore & Carolina Line Case, it would follow that the present decree would have to be reversed. In the Baltimore & Carolina Line Case this Court was careful to point out that the entry of judgment contrary to the verdict was sanctioned and authorized by express statute of the State of New York where the case was tried. It indicated plainly that its approval of the practice in the Baltimore & Carolina Line Case was conditioned upon, and rendered in deference to, the New York statute. In the

present cases even this support for the Circuit Court of Appeals' action is wanting and compels reversal.

Point 3 (b) THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY ON THE QUESTION OF CONSENT TO CANCELLATION.

The Glenwood Industrial Distilling Company owned a property located on Cedar Street north of Tioga Street in the City of Philadelphia. John M. Kennedy, 3d, held a first mortgage on this real estate. The Corn Exchange National Bank and Trust Company had acquired a second mortgage on the same property. It instituted foreclosure proceedings on that mortgage, and at or about the time of the foreclosure applied to petitioners for insurance, informing petitioners of the situation which existed with respect to the property intended to be insured. As a consequence of that disclosure there was attached to each of the policies a clause setting forth the fact that the buildings intended to be insured were under foreclosure proceedings on the security held by the Corn Exchange National Bank and Trust Company, that the premium for the insurance was being paid by the Corn Exchange National Bank and Trust Company and that, in the event of loss, the same would be adjusted with the Corn Exchange National Bank and Trust Company, such loss to be paid to it and John M. Kennedy, 3d, mortgagee, as their respective interests might appear (Rec., pp. 40, 53, 64).

After the Sheriff's sale the Corn Exchange National Bank and Trust Company concluded that there was no equity in the property and decided not to proceed further, but to abandon its bid. It then occurred to the Corn Exchange National Bank and Trust Company that there were unearned premiums refundable if the insurance policies were surrendered for cancellation. Realizing that under the form in which the policies were written Kennedy had an interest, it proceeded through its attorney, Nochem S. Win-

net, to take up with Kennedy the question of the surrender of the policies for cancellation or the purchase by Kennedy of the policies, Kennedy to pay the premium for the remainder of the term for which the policies would be effective.

Kennedy's statement of his conversation with Mr. Winnet appears (Rec., p. 82) as follows:

> "Q. At the time Mr. Winnet told you that the policies were cancelled—being surrendered for cancellation, you made no objection to that, did you?
>
> "A. As I recall the telephone conversation, Mr. Winnet said that he was cancelling, unless I chose to buy or take over the policies, to pay the unexpired premium. As I understood him, he was cancelling. I told him that I didn't intend to pay any unexpired premium or anything else, that I intended to put no further money into that building."

It is, of course, readily understandable that up until the time that the Corn Exchange National Bank and Trust Company reached a definite conclusion, that there was no equity in the property which it ought to protect by insurance, it was willing to assume, and did assume, the cost of the insurance that was carried thereon. However, when it realized that there was no equity to protect, the Corn Exchange National Bank and Trust Company then did what it was perfectly natural for it to do and what one would expect it to do; namely, recoup as much as possible on any expenses which it had incurred in connection with this particular property. It, therefore, sent for Kennedy and told him that it would cancel the policies unless he wanted to buy them. Kennedy was thereby afforded the opportunity of keeping in force contracts in which he had an interest by the payment of such amount as would continue the policies in effect until the date of expiration named therein. This Kennedy was not prepared or willing to do, but on the con-

trary he himself admits that he informed Winnet, when he was afforded the opportunity of buying this insurance for which he had paid nothing, that he did not intend to pay any unexpired premiums or other obligations in connection with the subject matter of the insurance. (Rec., p. 82.)

The situation thus disclosed by Kennedy's testimony is that he had an election either to buy the insurance or, by his refusal to purchase, permit the policies to be cancelled. He elected to adopt the latter alternative. The policies were surrendered, the return premiums paid to the bank which had originally paid the premiums for the insurance, and the transaction concluded approximately one month before the fire occurred.

Mr. Winnet's testimony while couched in different phraseology clearly discloses Kennedy's consent to the cancellation of the policies. He testified (Rec., pp. 108-109) as follows:

> "Q. Did you represent the Corn Exchange National Bank & Trust Company in connection with the foreclosure of a mortgage on the Glenwood Distillery Company property?
>
> "A. I did.
>
> "Q. What, if anything, did you have to do with the placing of the policies of insurance here in suit?
>
> "A. Mr. Kennedy had asked for insurance, because there had been a cancellation, and I finally asked Mr. Gottlieb to get the insurance as mortgagee.
>
> "Q. Now, will you state whether or not at the time this insurance was obtained, foreclosure proceedings were pending upon the mortgage which the Corn Exchange National Bank held as liquidator of the Union Bank & Trust Company?
>
> "A. There was. We had started a foreclosure suit.
>
> "Q. After the property had been sold at sheriff's

sale, what was done with these policies with reference to surrender for cancellation?

"A. Will you repeat that question?

"Q. After this property had been sold at sheriff's sale, did you discuss with Mr. Kennedy any question of the surrendering of these policies for cancellation?

"A. Yes; I did. I tried to get him to buy the policies. We determined that there was no equity, and we were not getting the title on the sheriff's sale—we just decided to abandon our bid, and I asked him if he wanted the policies, and he said how much would they cost, and I told him, and he said he wasn't going to spend another cent on the property, and I said I was going to cancel them. He says, 'You do what you think best. I am not going to spend another cent on them.'"

Thereafter, on February 6, 1932, Mr. Winnet wrote a letter to Mr. Kennedy which reads (Rec., p. 110):

"Mr. John M. Kennedy, 3rd, February 6, 1932.
Widener Building,
Philadelphia, Penna.

Re: Glenwood Industrial Products Company

Dear Mr. Kennedy:

I was wondering whether or not you have covered the property with the necessary insurance.

Since we decided to abandon our bids at the Sheriff's Sale, I am handing the various policies which were in my possession back to the Bank.

Very truly yours,"

NSW/ES

In cross-examination Mr. Winnet testified (Record, pp. 111-112):

"Q. Isn't it true that at no time in any of your discussions with Mr. Kennedy did he give you his con-

sent, so far as he was concerned, to cancel the policies? Isn't that true?

"Mr. Schell: That is objected to.

"The Court: The trouble is you are usurping the functions of the jury. Now, ask him what Mr. Kennedy did.

"By Mr. Shapiro:

"Q. Is it not true that Mr. Kennedy said, when you told him that you were thinking of cancelling these policies, that so far as he was concerned he would not pay any more money and in so far as he was concerned, you could do what you thought was best for the interests of your client?

"A. That's the substance of it.

"Q. Did he ever at any time tell you that you could cancel all these policies?

"A. He never did."

In the light of this testimony the learned Trial Judge of the United States District Court for the Eastern District of Pennsylvania submitted to the jury for its determination the question as to whether or not in the light of all the circumstances Kennedy had consented to the surrender and cancellation of the policies, saying in a portion of his charge on this subject (Rec., pp. 123-124):

> "Afterward, this other situation to which I have called your attention became acute, and the conservator, the Corn Exchange National Bank and Trust Company, holder of the second mortgage, evidently decided that there was nothing in that property for them, that the security was, in practical effect, nothing, that the property was not worth saving; that after the first mortgage there would be nothing for them, and they said, we will save out of this wreck all we can. What we can save is cancelling these insurance policies which we no longer need. In effect, they said that in view of

the value of the property, we will cancel these insurance policies and save out of the wreck the unearned premium, or as much as we can.

"Now, having made that arrangement with Mr. Kennedy, he being a party to this contract of insurance, it was only fair that they should direct Mr. Kennedy's attention to the fact that they were going to cancel those policies, that they were satisfied that there was no value in the property to satisfy their mortgage, and that we are willing to let everything go and put no more money into it, and get back from the insurance company the unearned premium and take our loss.

"They put the matter up to Mr. Kennedy, saying, we want to give you an opportunity to continue the insurance if you desire, and if you will pay us the unearned premium which would be coming to us on the cancellation of these policies, we will turn the whole benefit of the insurance over to you.

"Realizing that there was nothing of value in the mortgaged premises, Mr. Kennedy, 3rd, said that he would not put any more money in that proposition. It is alleged that he said, 'I won't put a dollar more in that property, and you can do as you please.'

Now, did that mean that you can cancel the policies, and that I, as a party, agree and consent to the cancellation? Is that what he meant by it? Was it tantamount to saying that you can cancel these policies, you may receive the unearned premium, I am done with it, and have no further interest in that policy? Is that what he meant? Is what he said tantamount to that? If it was, he consented to the cancellation of those policies by becoming a party to it and agreeing to it, and I charge you that your verdict must be for the defense, but if he did not, then those policies remained in force, and I charge you, as a matter of law, that he had an interest in those policies, and I charge you that the plaintiff in this case may recover."

The jury decided the question in favor of the petitioners and found as a fact that Kennedy's remarks in conjunction with his actions were a consent on his part to the surrender of the policies for cancellation before the loss occurred. The evidence, we submit, is clear that Kennedy knew and understood that the policies would be cancelled if he did not take them over by paying the premiums for the period of time which would intervene between the date when the Corn Exchange National Bank and Trust Company concluded to abandon any interest in the property and the date of the expiration of the policy contracts. He not only declined to take them over but told the attorney for the Corn Exchange National Bank that he might do with them whatever he thought best. This was not only an abandonment by Kennedy of any interest which he might have in the policies, but was tantamount to an express, positive agreement that the policies be cancelled. Having so agreed, it is unimportant and immaterial whether Kennedy knew of the exact time of the consummation of the cancellation. He knew that the bank intended to surrender the policies. He knew that he had been afforded an opportunity to take the policies over and had declined to do so. He knew that he had expressed himself as not being in any manner interested as to what the bank might do with them and from the time of his conversation with Winnet he had left the bank in the position of doing what it saw fit with the policies. Whatever it concluded to do was obviously satisfactory to him. Certainly Kennedy's statements to Winnet authorized the consummation of the cancellation and, when the cancellation was effected, Kennedy was bound by the act of the bank in surrendering the policies for that purpose.

In the original opinion of the Circuit Court of Appeals, Circuit Judge Thompson said (Rec., p. 149):

> "The issue is whether the policies were in force at the time of the fire or whether Kennedy had acquiesced

in their cancellation. At the trial sufficient emphasis was placed upon the question whether the conversation between Kennedy and Winnet amounted to a consent by Kennedy to a cancellation of the policies. This issue was presented to the jury which, by its verdict, must have decided it in the affirmative."

This we submit is a correct statement of the legal question presented. The evidence offered was such that the jury had a right to find, as it did find, that Kennedy had acquiesced in the cancellation of these policies. The mere fact that several days went by between the date of the conversation which Winnet had with Kennedy and the date of the actual cancellation of the policies, is certainly not important. The Corn Exchange National Bank and Trust Company had the right to assume that Kennedy's acquiescence was effective unless withdrawn. Once having obtained his consent, it certainly was not necessary from a legal standpoint to re-obtain his consent solely because the policies were not actually delivered into the possession of the companies until a short time after the conversation occurred. What Kennedy did was to permit the bank, which obtained and paid for the policies, to surrender and receive the return premiums. Certainly Kennedy could not and did not expect the Corn Exchange National Bank when it came to realize that there was no equity in the property to continue to pay for and carry insurance solely for his benefit. He was afforded an opportunity to take over these policies. He understood that if he did not, they would be surrendered for cancellation. He not only declined to purchase the contracts but by his words and actions acquiesced in their surrender. The jury so found and the Circuit Court of Appeals for the Third Circuit was in error in overruling this fact finding.

Point 4. CONTRACTS OF INSURANCE MAY BE CANCELLED BY MUTUAL CONSENT.

It will be recalled from what has heretofore been stated that in the first opinion rendered by the Circuit Court of Appeals, the court held that the trial court had submitted to the jury with sufficient emphasis the question as to whether or not Kennedy had acquiesced in the cancellation of the policies. It, however, concluded that there was another important question which the trial court had overlooked; namely, whether or not Kennedy's conversation with Winnet amounted to a waiver of his right to notice of cancellation.

This conclusion of the Circuit Court is fallacious for two reasons:

(1) The cancellation was not requested by the companies.

(2) It is not necessary to give a person notice of his own act.

The policies of insurance contain the following provisions with respect to cancellation:

> "Cancellation of policy — This policy shall be cancelled at any time at the request of the insured; in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company, by giving to the insured a five days' written notice of cancellation, with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if

not tendered) will be refunded on demand.'' (Rec., pp. 45, 57.)

''This Company reserves the right to cancel this Policy at any time as provided by its terms, but in such case this Policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.'' (Rec., pp. 40, 53, 63.)

The Court will note that the policies could be cancelled at any time at the request of the insured and the other provisions contained in the cancellation clause of the policies and in the clause with respect to cancellation set forth in the standard mortgage clause refer only to what must be done by the company when it endeavors to effect a cancellation of the contract. Those particular parts of the respective clauses to which we have referred, have no applicability and play no part in this controversy. The United States Circuit Court of Appeals in its first opinion wholly confounded the situation and entirely overlooked that an insurance contract like any other contract may be cancelled by mutual consent and the provision which gives to the assured the right to cancel at any time.

There are numerous authorities to support our contention of the right to cancel by mutual consent without notice. Among those authorities may be noted the following:

HiGRADE OIL CO. v. U. S. FIDELITY & GUARANTY INS. CO., 93 W. Va. 448;
INSURANCE CO. v. JOHNSON, 105 Fed. 286;
WESTCHESTER FIRE INSURANCE CO. v. McWILLIAMS, 188 S. W. 25 (Tex.);
HILLOCK v. INSURANCE CO., 54 Mich. 531;
SCHEEL v. INSURANCE CO., 228 Pa. 44;

INSURANCE CO. of N. A. v. McWilliams, 218 S. W. 80 (Tex.);
OCEAN ACC. & GTY. CORP. v. MEETS, 61 Utah 426.

The syllabus in the case of

FARMERS' MUTUAL INSURANCE CO. v. WENGER, 90 Pa. 220,

is as follows:

"The by-laws of a mutual insurance company provided that the liability of a member should continue, until the cancellation of his policy and the erasure of his name from the books of the company. Held, that the company was relieved from liability for a loss by fire after a voluntary surrender of his policy by a holder, without a formal cancellation of the same and the erasure of his name from the books of the company."

In the case of

McRAE v. MERCURY INSURANCE CO., 126 Neb. 469,

the Court said (p. 473):

"(1) 'An agreement for an immediate cancellation without giving five days' notice can be made, and this may be shown by acts and conduct as well as by direct words.' Home Ins. Co. v. Chattahoochee Lumber Co., 126 Ga. 334, 55 S. E. 11, 12. The same principle applies to a life insurance policy. Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31.

"(2) Acquiescence in a cancellation notice will operate to cancel the policy and will work an estoppel to assert that the policy is still in force. Hopkins & Cochran v. Phoenix Ins. Co., 78 Iowa, 344, 43 N. W. 107; Hilock v. Traders' Ins. Co., 54 Mich. 531, 20 N. W.

571; Missouri State Life Ins. Co. v. Hill, 109 Ark. 17, 159 S. W. 31."

In the case of

LaFRANCE WORKSHOP LAMPSHADE CO. v. BUFFALO INSURANCE CO., et al., 318 Pa. 191,

in which the appellant raised the same proposition as is raised here: namely, that notwithstanding the fact that the policies had been cancelled by mutual consent or agreement, the assured was still entitled to notice of cancellation as provided in the policy, the Supreme Court said (p. 195):

"In appellant's argument it is suggested that, as the policies contained a provision for cancellation 'at any time by the company, by giving to the insured a five days' written notice of cancellation. . . .' etc., and, as no notice was given by the companies direct to the plaintiff, the policies were nevertheless in force. The contention must be rejected. For the purposes of this insurance, plaintiff and Lare and Company were one; the authority conferred on Lare and Company, so far as the insurance companies are concerned with it, was sufficient to justify the companies (cf. Lauer Brewing Co. v. Schmidt, 24 Pa. Superior Ct. 396, 401) in continuing to deal with the broker by accepting the policies from him for cancellation for want of payment of premiums.

"But, properly considered, the action of the companies was not under the cancellation clause quoted. The parties were competent to cancel their contract by agreement at any time. See Scheel v. German-American Ins. Co., 228 Pa. 44, 76 A. 507; Arnfeld v. Guardian Assurance Co., 172 Pa. 605, 34 A. 580; Farmers Mut. Ins. Co. v. Wenger, 90 Pa. 220. Indeed, there was a provision on the subject. 'This policy shall be cancelled at any time at the request of the insured; in

which case the company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time.' "

It will be noted that in the last cited case, the policies were surrendered for cancellation by the agent of the assured. In the instant case Winnet was acting in the same capacity for Kennedy. It will thus be seen that the notice which a party to a contract of insurance is entitled to receive exists only where the insurer seeks to cancel, the purpose of the notice of course being to afford the insured an opportunity to replace the insurance in other companies. The instant case does not present a situation where your petitioners endeavored to cancel the policies, but a case where the policies were cancelled by mutual agreement. The verdict of the jury affirmatively establishes the consent and acquiescence of Kennedy thereto.

The authorities set forth herein establish that no notice is necessary where the policy is cancelled by mutual agreement or consent; and by his consent and acquiescence Kennedy not only waived his right to such notice but is likewise estopped from asserting any rights under the contracts by reason of that consent and acquiescence.

It would be a strange rule of law which would require the giving of notice to a person of his own act.

VI. CONCLUSION.

In view of the foregoing we respectfully submit that the decisions of the Circuit Court of Appeals for the Third Circuit are contrary to the decisions of this Court, of other Federal Courts, and of the Supreme Court of Pennsylvania, result in depriving petitioners of the right to trial by jury, and are not in conformity with the practice prevailing in the Commonwealth of Pennsylvania.

Accordingly the decisions of the Circuit Court of Appeals should be reversed and the judgment entered by the District Court reinstated and affirmed.

Respectfully submitted,

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